No. 06-427

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In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS AND THE COLORADO LEAGUE OF CHARTER SCHOOLS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Alliance for Public Charter Schools ("NAPCS") is a national nonprofit organization committed to advancing the charter school movement.[1] Originally formed as a coalition of national school reform organizations, the NAPCS is now the nation's leading public charter school support and advocacy organization. The mission of the NAPCS is to increase the number of high-performing public charter schools available to all families, particularly low-income and minority families who currently do not have access to quality public schools. The NAPCS provides assistance to state charter school associations and resource centers, develops and advocates for improved public policies, and serves as the united voice for this large and diverse movement.

The Colorado League of Charter Schools ("CLCS") is a non-profit membership organization founded in 1994 to "serve and support Colorado's charter schools and their students." The League represents its one hundred and thirty member schools (serving over 53,000 students) in a variety of settings and provides technical support and

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that no part of this brief was authored by counsel for any party, and no person or entity other than the National Alliance for Public Charter Schools or the Colorado League of Charter Schools or its members made any monetary contribution to the preparation or submission of the brief.

assistance to both existing charter schools as well as groups seeking charter status. Among the League's members are a number of secondary schools that are members of the Colorado High School Activities Association and depend on the continued even-handed regulation of activities under their purview. Any regulatory system that arbitrarily categorizes charter schools differently than traditional public schools is contrary to the protected interests of those schools and their students.

Charter schools are public schools that have the freedom to operate with greater independence than traditional public schools. Charter school administrators, teachers and parents work together to make decisions ranging from budgets to staffing to curriculum that best meets the needs of the student. In exchange for the freedom to innovate, charter schools are held accountable for increased student achievement. Charter schools play a critical role in providing a high-quality option in public education.

The landscape of secondary education has changed dramatically over the past two decades. By way of example, over one million American children currently attend public charter schools. In this regard, parents and prospective students can now choose from a wide variety of educational options in both the public and private arenas. The NAPCS works on behalf of thousands of public charter schools across the United States. The CLCS works on behalf of its one hundred and thirty member charter schools in Colorado. The NAPCS and the CLCS, like the respondent in this case, have a strong interest in preserving and protecting First

Amendment rights of public charter schools and ensuring that prospective students and their parents have access to the information needed to make informed decisions regarding their children's educational opportunities. The legal principles advocated by the Tennessee Secondary School Athletic Association ("TSSAA") in this case unquestionably restrict the rights of everyone but traditional public high schools to convey important information to families and students across the country. In this regard, the First Amendment rights at issue in this case arise in an athletic context but their importance transcends interscholastic sports. Although the NAPCS and the CLCS recognize the value in preventing the exploitation of student-athletes, the TSSAA's role in regulating interscholastic sports cannot and should not be permitted to restrict the free flow of information that is essential for making informed educational choices.[2] The recruitment rule promulgated by the TSSAA is an overly broad restriction on free speech that unnecessarily results in the erosion of the rights otherwise guaranteed by the First Amendment.

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[2] The *amicus curiae* brief of the Association of Christian Schools International addresses in detail the effects that the recruiting rule has in restricting the exchange of information necessary to make real school choice possible.

SUMMARY OF ARGUMENT

This Court previously concluded that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). On appeal after remand, the court of appeals correctly concluded that the recruiting rule enforced by the TSSAA implicated Brentwood's First Amendment rights and was not narrowly tailored to accomplish TSSAA's interests. Petitioner now requests that this Court revisit its decision in *Brentwood I* and reverse its holding by arguing that the TSSAA is not a sovereign State exercising policy power but rather a state actor that asks its members to honor its voluntary contractual obligations. This Court properly concluded in *Brentwood I* that the TSSAA's regulatory authority "may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." *Brentwood*, 531 U.S. at 290. The TSSAA has not offered any basis for challenging the "entwined" relationship between the TSSAA and the Tennessee State Board of Education. Thus, this Court should not revisit its holding in *Brentwood I* as this Court properly concluded that the TSSAA was a state actor and, in enforcing its athletic regulations, was engaged in state action.

Petitioner further insists that because the restraint on free speech derives from respondent's "voluntary" or "contractual" participation in the TSAAA rather than from the TSSAA's exercise of its sovereign power, the TSSAA should be afforded a more deferential review thus leading to a reversal of

the court of appeals' conclusion that the TSSAA's actions constituted an unconstitutional restriction on the respondent's First Amendment rights. The cases relied upon by the TSSAA in support of its proposition, however, are clearly distinguishable from the case at bar. In correctly recognizing this distinction, the court of appeals noted that "the TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 442 F.3d 410, 424 (6th Cir. 2006). Moreover, the court of appeals properly recognized that the holdings in those cases had limited application and the deferential analysis in those cases was employed to fit the unique circumstances presented in those cases. Accordingly, the court of appeals correctly rejected the distinction advanced by the TSSAA and properly concluded that the TSSAA's exercise of regulatory authority was subject to "intermediate scrutiny" under the First Amendment.

In addition, although the NAPCS and the CLCS believe that the court of appeals properly and correctly determined that the recruiting rule, as applied to respondent, unconstitutionally restricts Brentwood's First Amendment rights, the NAPCS and CLCS also believe that the rule, as written, has a disparate impact on non-traditional public schools and results in the creation of two classes of schools – traditional public schools and everyone else. The recruiting rule broadly prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or not

connected," with the school to recruit a student for athletic purposes. The TSSAA has asserted three interests as justification for the recruiting rule. The overarching purpose is to avoid "exploitation." The "interpretive commentary" that is used to aid the TSSAA in the interpretation of the recruiting rule, however, contains exceptions that undermine the purported governmental interests in promulgating the rule. More specifically, the rule exempts contact between school representatives and student-athletes "where there is a definite feeder pattern involving the schools." The exceptions to the rule, therefore, permit contact between school representatives and prospective student-athletes in traditional public high schools since traditional public high schools draw their students from certain designated geographical areas thereby qualifying as a "definite feeder pattern involving the schools." Consequently, the rule undermines the bases advanced by the TSSAA for promulgating the rule and, therefore, is not narrowly tailored to further a substantial governmental interest. Moreover, the rule results in disparate treatment for those schools, such as public charter schools, that do not have "definite feeder patterns." Accordingly, a reversal of the court of appeals' conclusion that the recruiting rule violates Brentwood's First Amendment rights will impermissibly restrict the First Amendment rights of the "other schools," such as public charter schools, that do not rely on attendance zones for their enrollment.

ARGUMENT

I. THIS COURT PROPERLY CONCLUDED IN *BRENTWOOD I* THAT THE TSSAA IS A STATE ACTOR AND THERE IS NO BASIS FOR RECONSIDERING *BRENTWOOD I*

This Court previously concluded that the TSSAA is a state actor for purposes of 42 U.S.C. § 1983. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"). In its attempt to avoid constitutional scrutiny of its recruiting rule, the TSSAA requests that this Court revisit its holding in *Brentwood I* and overrule its conclusion that the TSSAA is a state actor. Pet. Br. at 46-50. In the event that it fails in its efforts to convince this Court to reconsider its prior ruling, the TSSAA, joined by the Solicitor General as *amicus curiae*, contends that because the relationship between the TSSAA and Brentwood is "contractual" and because Brentwood "voluntarily" agreed to the speech restrictions contained in the rule as a condition of membership, the rule is entitled to a more deferential review and should lead to the reversal of the court of appeals' conclusion that the TSSAA's actions constituted an unconstitutional restriction on the respondent's First Amendment rights. The NAPCS contends that neither of these arguments provides a basis for reversal of this Court's ruling in *Brentwood I* or in a reversal of the court of appeal's decision below.

A. The TSSAA Has Not Provided A Basis For Reconsidering *Brentwood I*

The Court should not revisit its holding in *Brentwood I* that the TSSAA's "regulatory activity [against Brentwood] may and should be treated as state action." *Brentwood*, 531 U.S. at 290. In *Brentwood I*, this Court concluded that the TSSAA, a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools, was engaged in state action when it enforced its recruiting rule against a member school (Brentwood). In so ruling, this Court noted that it has treated a nominally private entity as a state actor in a range of circumstances, including when the entity "is entwined with governmental policies" or when government is "entwined in [its] management or control." *Id. citing Evans v. Newton*, 382 U.S. 296 (1966) (holding that private trustees to whom a city had transferred a park were nonetheless state actors barred from enforcing racial segregation because the park served the public purpose of providing community recreation and the municipality remained entwined in its management and control). This Court's holding in *Brentwood I* was based upon such a "pervasive entwinement" of state school officials in the structure of the TSSAA. *Id.* at 291. This Court's well reasoned conclusion was based upon the following facts, which are undisputable: (1) the association has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority; (2) the association draws its officers from public school officials; (3) the association

derives much of its funding from the dues paid by its public schools and therefore largely provide for the association's financial support; (4) the association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system; and (5) the State Board of Education repeatedly recognized (and, in 1972, by formal "designation" charged) the TSSAA as the regulator of interscholastic athletics for public and private secondary schools statewide.

The TSSAA has not offered any basis for challenging the "entwined" relationship between the TSSAA and the Tennessee State Board of Education. Instead, the TSSAA urges reconsideration of *Brentwood I* by arguing that the entwinement analysis "is difficult to square with prior precedent." Pet. Br. at 46. However, this Court has relied upon the entwinement analysis on several occasions to support a finding that a private entity qualifies as a state actor for constitutional purposes. *See Evans v. Newton*, 382 U.S. 296, 299 (1966) (holding that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (concluding that a privately owned restaurant located within a public parking garage was sufficiently involved with state authority to bring its racially discriminatory actions within the proscription of the Fourteenth Amendment). Although the TSSAA contends that "the entwinement inquiry provides no full answer to the ultimate question [as] to whether TSSAA's

enforcement of the recruiting rule against Brentwood 'can fairly be attributed to the State,'" there can be no question that the exercise of regulatory authority (enforcing the recruiting rule) by a state actor such as the TSSAA will and should be attributed to the State. Accordingly, there is no reason to revisit the holding in *Brentwood I* as the closely entwined relationship between the State Board of Education and the TSSAA overwhelmingly established that the TSSAA, as the authorized regulator of interscholastic athletics for secondary schools throughout the State, was operating at all times as a state actor.

B. The TSSAA Is Not Entitled to Special Deference As It Was Acting As a Sovereign In Enforcing The Recruiting Rule

The TSSAA contends that, even if it qualifies as a state actor, it is entitled to special deference in its regulation of its members' speech because the participation of Brentwood and others is "contractual" or "voluntary" in nature. Pet. Br. at 20-32. The TSSAA essentially contends that the TSSAA is not a sovereign State exercising policy power but rather a state actor that asks its members to honor its voluntary contractual obligations and, therefore, the recruiting rule is not an unconstitutional condition. The authority relied upon by the TSSAA in support of adopting a more deferential First Amendment standard is factually distinguishable, is limited in its application, and fails to provide any justification for the departure

from the "intermediate" scrutiny applied by the court of appeals below.

As discussed above, this Court has concluded that the TSSAA is the statewide regulator of interscholastic secondary school athletics in Tennessee. Thus, enforcement of the recruiting rule against TSSAA members such as Brentwood, which constitutes the exercise of regulatory action, is different than a state actor acting as a contract employer, independent contractor or a disburser of federal funds. As a preliminary matter, the court of appeals has correctly noted that "the applicability of the First Amendment to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not." *Brentwood*, 442 F.3d at 423. Even if such a distinction were applicable in this case, the instances in which this Court has applied a more deferential First Amendment analysis were driven by the unique nature of the relationships between the parties that allowed the imposition of conditions on free speech rights. No such unique relationship exists in the present case.

For example, *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Snepp v. United States*, 444 U.S. 507 (1980) involved the regulation of speech in the context of the government's role as an employer. As this Court noted, "the State has interests as an employer in regulating the speech of its employers that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 569. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), this Court addressed only the narrow issue of whether

and to what extent, independent contractors with the government are protected by the First Amendment." *Id.* at 685 (emphasizing the "limited nature of our decision today"). As explained in *Umbehr*, "the similarities between government employees and governmental contractors with respect to [freedom of speech] are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve efficiency, efficacy, and responsiveness to the public, and to prevent the appearance of corruption." *Id.* at 674. In both *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Grove City College v. Bell*, 465 U.S. 555 (1984), the government was acting as a contractor in a subsidy context and imposed certain limits to the programs accepting such funding. In such federal funding programs, a certain degree of latitude in restricting speech has been permitted because, as pointed out by this Court in *Legal Services v. Velasquez*, 531 U.S. 533, 541 (2001), "when the government disburses public funds to private entities to convey a government message, it may take legitimate and appropriate steps to insure that its message is neither garbled nor distorted by the grantee."

However, as correctly pointed out by the court of appeals below, the present case "does not involve the government as a party in a contractual relationship with an independent contractor" and "there are obvious differences between the TSSAA's role in this case and the government's role as employer." *Brentwood*, 442 F.3d at 422. Likewise, the TSSAA's enforcement of the recruiting rule in the present context does not involve a funding

program and Brentwood's relationship with the TSSAA does not involve its receipt of public funds. Thus, none of the rationales offered in the cases cited by the TSSAA apply to Brentwood in the present case. Instead, TSSAA's role is as a government regulator. Accordingly, intermediate scrutiny should apply to the TSSAA's application and enforcement of the recruiting rule.

C. Brentwood Did Not Waive Its First Amendment Protections By "Voluntarily" Participating in the TSSAA

The TSSAA further insists that because the restraint on free speech derives from respondent's "voluntary" or "contractual" participation in the TSAAA rather than from the TSSAA's exercise of its sovereign power, Brentwood has "effectively waive[d] ... any challenge to the conditions" imposed by the TSSAA. Pet. Br. at 21. However, this Court has cautioned that conditions placed upon benefits offered by a state actor "cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a condition that limited tax exemption availability to war veterans who affirmed that they did not advocate the overthrow of the United States Government by unlawful means). Likewise, in *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), this Court refused to relax its First Amendment analysis based upon the voluntary nature of a federal program that provided funds for legal services for the indigent when Congress imposed conditions on

the states' use of the federal funds. Accordingly, this Court has recognized that an entity's "voluntary" participation does not constitute an implied waiver of its free speech rights under the First Amendment.[3]

Moreover, this Court should refuse to accord greater deference to the TSSAA because, as recognized by the district court "the TSSAA is effectively the only game in town" for high schools seeking to maintain an interscholastic athletic program in Tennessee. *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 304 F. Supp. 2d at 981, 997 (M.D. Tenn. 2003). As such, while the complainants in *Speiser*, *Velasquez*, *Rust*, and *Grove City* may have had a realistic "choice" of not participating in the government programs at issue, Brentwood's participation in the TSSAA is not truly a "voluntary" decision. In this regard, absent similarly state-sanctioned athletic regulators such as TSSAA to choose among, Brentwood (and schools similarly situated in other states with a single state-wide athletic association) cannot realistically pursue other avenues for state sanctioned athletic programs. Accordingly, the regulatory nature of the

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[3] Notably, this Court has recognized that an effective waiver of a constitutional right only occurs where there is an "intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 682 (1999). As recognized by the court of appeals, "the contract [between the TSSAA and Brentwood] gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional" and "the contract's silence [therefore] becomes evidence of an absence of waiver of constitutional rights." *Brentwood*, 442 F.3d at 425.

TSSAA coupled with the lack of a true "voluntary" relationship supports the court of appeals' conclusion that the TSSAA is a state actor whose restrictions on First Amendment rights should be subject to intermediate scrutiny.

II. THE TSSAA'S RECRUITING RULE IS NOT NARROWLY TAILORED TO FURTHER GOVERNMENTAL INTERESTS AS IT CREATES TWO CLASSES OF SCHOOLS – TRADITIONAL PUBLIC SCHOOLS AND EVERYONE ELSE

Although the NAPCS and the CLCS believe that the court of appeals properly and correctly determined that the recruiting rule, as applied to respondent, unconstitutionally restricts Brentwood's First Amendment rights, the NAPCS and the CLCS also believe that the rule, as written, has a disparate impact on non-traditional public schools and results in the creation of two classes of schools – traditional public schools and everyone else, including public charter schools. The present case arises from the promulgation and application of a "recruiting rule" contained in the TSSAA bylaws aimed at regulating the attempts of secondary schools to recruit middle school student athletes for athletic programs. The bylaws include a number of questions and answers and guidelines, described as "interpretive commentary," that are used to aid the TSSAA in the interpretation of the recruiting rule. Although the TSSAA contends that the commentary to the anti-recruitment rule is non-binding, Judge Rogers, in his dissenting opinion, properly noted that the

commentary is non-binding "only to the extent that the TSSAA has a certain amount of discretion in enforcing the rule, and the examples cited in the interpretive commentary are a non-exclusive list." *Brentwood*, 442 F.3d at 452, FN 3. One portion of the "interpretative commentary" includes the following questions and answers that address the guidelines to be employed in determining whether there has been undue influence and, hence, a violation of the rule:

4.

Q. What are some of the guides (sic) used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

* * *

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school **except where there is a definite feeder pattern.**

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school **except where there is a definite feeder pattern.**

* * *

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with **students at a school that is defined as a feeder school or meet students who are zoned to attend that school the following year**. This visit must be cleared by the principals of both schools.

Joint Appendix 181 (emphasis added).

The recruiting rule broadly prohibits the use of "undue influence" on a student or his or her parents or guardians by "any person connected, or

not connected," with the school to recruit a student for athletic purposes. The TSSAA has asserted three interests as justification for the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field among the various member schools. In this regard, Ronnie Carter, the Executive Director of the TSSAA, testified that preventing "exploitation" is the "fundamental" purpose of the recruiting rule. *Brentwood*, 304 F. Supp. 2d at 992.

The "interpretive commentary" that is used to aid the TSSAA in the interpretation of the recruiting rule, contains exceptions "where there is a definite feeder pattern involving the schools." In addition, the recruiting rule permits recruiting in situations where students are zoned to attend that school the following year. The exceptions to the rule, therefore, expressly permit contact between school representatives and prospective student-athletes in traditional public high schools since traditional public high schools draw their students from certain designated geographical areas thereby qualifying as a "definite feeder pattern involving the schools" and/or schools whose students are "zoned to attend that school the following year." Consequently, the rule undermines the bases advanced by the TSSAA for promulgating the rule and, therefore, is not narrowly tailored to further a substantial governmental interest. Further, the TSSAA has not provided any reasoned basis for distinguishing between "feeder patterns" and other situations nor has it identified any substantial governmental interest that could conceivably explain the rationale

behind preventing Brentwood from contacting students that have already signed enrollment contracts with Brentwood on the one hand and permitting high school coaches to contact prospective students at "feeder schools" on the other.

Moreover, the recruiting rule results in disparate treatment for those schools, such as public charter schools, that do not have "definite feeder patterns."[4] The district court expressly acknowledged this disparate treatment:

> The failure of the TSSAA to narrowly tailor the Recruiting Rule, as applied in this case, is made further evident by the "feeder pattern" exceptions that exist in the interpretive commentary to the Recruiting Rule. As applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students. Various witnesses testified how the "feeder pattern" exception for public school is actually used to broadly permit the type of speech for which Brentwood Academy has been sanctioned by the TSSAA. The bottom line is that schools in a "feeder pattern" can make certain school-initiated,

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[4] As noted by the United States Court of Appeals for the Sixth Circuit, the "definite feeder pattern" exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher. *Brentwood*, 442 F.3d at 417.

> targeted speech that schools, such as Brentwood Academy, outside the "feeder pattern," cannot make.

Brentwood, 304 F. Supp. 2d at 995-96. Thus, the rule creates two different classes of schools, traditional public schools and everyone else. In the former class, the rule expressly permits recruiting while in the later class, the rule prohibits such recruiting activities.

The disparate treatment that results from enforcement of such a rule affects a significantly large portion of students in the United States. Notably, over *one million students in the United States attend public charter schools*. These charter schools generally do not rely on attendance zones for their enrollment. Hundreds of thousands of other students attend private schools that likewise do not rely on attendance zones for their enrollment. As explained above, the recruiting rule impermissibly restricts the ability of non-traditional public schools (public charter schools, private schools, etc.) to attract students to their schools by placing unconstitutional restrictions on the nature and type of information that can be disseminated to millions of students that may be interested in attending non-traditional public schools. As discussed in more detail in the *amicus curiae* brief of the Association of Christian Schools International, although the recruiting rule arises in the athletic context, the First Amendment rights at issue in this case transcend interscholastic sports. Accordingly, a reversal of the court of appeals' conclusion that the recruiting rule violates Brentwood's First

Amendment rights will impermissibly restrict the First Amendment rights of the "other schools," such as public charter schools, that do not rely on attendance zones for their enrollment and effectively create two different classes of schools - traditional public schools and everyone else.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Respondent's brief, the decision of the court of appeals should be affirmed.

Dated: March 27, 2007.

Respectfully submitted,

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